MOTION FILED
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No. 84-468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, et al.,

Petitioners,

—v.—

CLEBURNE LIVING CENTER, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE NEW YORK CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES FOUNDATION OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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**MOTION OF THE
AMERICAN CIVIL LIBERTIES UNION,
THE NEW YORK CIVIL LIBERTIES UNION,
THE AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF SOUTHERN CALIFORNIA
AND THE AMERICAN CIVIL LIBERTIES
FOUNDATION OF TEXAS
FOR LEAVE TO FILE A BRIEF
AMICI CURIAE IN SUPPORT OF RESPONDENT**

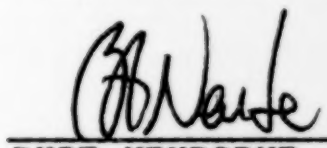
The American Civil Liberties Union, the New York Civil Liberties Union, the American Civil Liberties Union Foundation of Southern California and the American Civil Liberties Foundation of Texas respectfully move for leave to file the attached brief amici curiae in support of Respondent Cleburne Living Center, Inc.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of more than 250,000 members dedicated to the protection of civil rights and civil liberties. The New York Civil Liberties Union, the ACLU of Southern California, and the American Civil Liberties Foundation of Texas are state affiliates of the ACLU.

The ACLU and its state affiliates have long worked to uphold the rights of disadvantaged groups under the equal protection clause of the Fourteenth Amendment. The ACLU has also frequently asserted the federal statutory and constitutional rights of handicapped persons. The ACLU believes that this case presents the Court with an important opportunity to clarify the rights of mentally retarded persons.

Respondents have consented to the filing of this brief amici curiae. However, the petitioners have declined to grant consent.

Respectfully submitted,



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STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the decision below. In addition to these specific facts, however, the following factual material is necessary for a full understanding of the issues presented.

A. Access To Adequate Group Housing Is Critically Important To Mentally Retarded Persons.

There are more than two million mentally retarded persons in America. Herr, Rights and Advocacy For Retarded People 3 (1983). For many of these individuals, the availability of group living arrangements similar to the group home at issue in this case offers the only alternative to life-long confinement in large and dehumanizing institutions. Jt. App. 33-34; 94 (Trial Finding of Fact No. 30).

Historically, institutions have isolated mentally retarded persons in remote, stigmatizing settings, Jt. App. 95 (Trial Finding

of Fact No. 32), which typically failed to afford minimally adequate care and treatment and on numerous occasions subjected residents to unspeakable conditions of physical squalor. During the last decade, litigation brought by parents and relatives of mentally retarded inmates at facilities in seventeen states has revealed widespread instances of physical and educational neglect. In many cases residents were naked or partially clothed; were warehoused in filthy and unsanitary environments; suffered a disproportionate number of serious injuries and major diseases; experienced an extraordinarily high mortality rate; and received little or no medical care or habilitative treatment. See, e.g., New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956, 961-962 (2d Cir. 1983); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (Willowbrook); Wyatt v.

Stickney, 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (Partlow State Hospital); Pennhurst State School and Hosp. v. Halderman, 104 S. Ct. 900 (1984).

Even in those public facilities where living conditions are less brutal, constraints on money and resources all too often make overcrowding and understaffing an inevitable fact of institutional life, as this Court has noted. Youngberg v. Romeo, 457 U.S. 307, 324 (1983). Consequently, many mentally retarded persons live out their lives in settings which are at best custodial. The barren and unstimulating environment at most state institutions impedes the growth and development of basic living skills. Indeed, it is well established that institutionalized persons frequently lose skills that they had mastered prior to admis-

sion.[1] Studies of the effects of prolonged institutionalization on mentally retarded people have documented, inter alia, declines in longitudinal I.Q.,[2] communication skills[3] and overall functioning levels.[4] Comparisons among persons with similar clinical characteristics in institutional and community settings indicate that residents of community homes are more likely to increase their functioning level, whereas institutionalized

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[1] King, Raynes and Tezarel, Patterns of Residential Care: Sociological Studies in Institutions for Handicapped Children (1971); Heal, Sigelman and Switsky, Research on Community Alternatives For the Mentally Retarded, 9 Int'l Rev. of Research in Mental Retardation 209, 243 (2d ed. 1978).

[2] Silverstein, Changes in the Measured Intelligence of Retardates as a Function of Hospital Age, 1 Developmental Psychology 125-27 (1969).

[3] Phillips and Balthegar, Some Correlates of Language Determination in Severely and Profoundly Retarded Long-Term Institutionalized Residents, 83 Amer. J. of Mental Deficiency 402-08 (1979).

[4] Keith and Ferdinand, Changes in Levels of Mental Retardation: A Comparison of Institutional and Community Populations, 9 TASH Journal 26-30 (1984).

persons are more likely to regress at a higher rate. Keith and Ferdinand, supra note 4. For many people, life after institutionalization begins in the group home. The Cleburne Living Center, for example, was intentionally placed near a park, a school and a shopping area so that its residents would have full access to the community at large.

In response to the acknowledged deficiencies and high cost of institutions, most states, including Texas, have adopted policies which promote deinstitutionalization and encourage the development of group housing for mentally retarded persons. See brief amicus curiae of the State of Texas. Thus, between 1971 and 1982, the number of state institutions for retarded people decreased by 34 percent from 279 to 182, and the number of institutionalized residents dropped from 189,546 to 119,335.[5]

However, the process of deinstitutionalization depends upon the ability to establish community residences. Where group housing is unavailable, deinstitutionalized persons have found themselves among the homeless and impoverished, frequently the victims of crime or the residents of substandard nursing homes or rundown hotels.[6] Access to group housing is critically important to the efforts of mentally retarded persons to break the cycle of institutionalization and become participants in "normal" community life. Without it, mentally retarded people will have little meaningful opportunity to engage in "the pursuit of happiness."

It is, therefore, no exaggeration to characterize the interest at stake in this

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[6] See United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 35 (1983).

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case as a critical "liberty" interest in the most traditional sense of the word. At stake is the difference between life in an impersonal and understaffed institution with the attendant restrictions on physical mobility, and personal fulfillment and a relatively normal life in a residential setting. Indeed, for the mentally retarded, the differences between the quality of life in an institutional setting and life in a group home setting is far greater than the difference between confinement in a prison and commitment to a mental hospital which was found sufficient to warrant full "liberty" protection in Vitek v. Jones, 445 U.S. 480 (1980).

B. Mentally Retarded Persons Have Been The Victims of Irrational Prejudice And Are Uniquely Unable To Protect Themselves By Resort To The Political Process.

Throughout history, mentally retarded persons have been the victims of irrational stereotypes and prejudices and have been

subjected to inhumane and discriminatory practices. In America, the mentally retarded have been segregated,[7] sterilized,[8] forbidden to marry or procreate,[9] and effectively excluded from the political process.[10] Despite the recent enactment of certain protective legislation, deeply rooted prejudices are still reflected in invidious governmental actions, such as the refusal to permit the establishment of a group home for mentally retarded adults in this case.

Although this Court has declared that

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[7] Herr, supra page 1, at 21-27.

[8] Kindergran, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States, 43 Chi.-Kent L. Rev. 123, 139 (1966).

[9] Linn & Bowers, The Historical Fallacies Behind Legal Prohibitions Of Marriages Involving Mentally Retarded Persons -- The Eternal Child Grows Up, 13 Gonzaga L. Rev. 625 (1978); Shaman, Persons Who Are Mentally Retarded: Their Right to Marry and Have Children, 12 Fam. L. Q. 61 (1978).

[10] Note, Mental Disability and the Right to Vote, 88 Yale L. J. 1644 (1979).

marriage and procreation are "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), mentally retarded persons have been a primary target of sterilization laws and have consistently been prevented from marrying. During the first third of this century, eugenic sterilization laws[11] were enacted to prevent mentally retarded persons from producing "degenerate offspring." Thirty-one states passed laws which

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[11] The reasoning behind these statutes is expressed in the opening paragraph of a 1934 law review note:

> Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feebleminded, epileptic, insane, criminal, diseased and others.

Note, A Sterilization Statute for Kentucky, 23 Ky. L.J. 168 (1934). The premises underlying eugenic sterilization, however, have been thoroughly discredited. See, e.g., Kindergran, supra note 8, at 139.

resulted in the involuntary sterilization of more than 70,000 mentally retarded Americans.[12] A recent United States Civil Rights Commission survey noted that fifteen states still authorize compulsory sterilization of mentally retarded or mentally ill individuals.[13] Similarly, a majority of states have passed laws proscribing marriage where one of the parties is mentally retarded.

To supplement eugenic sterilization laws, states also enacted eugenic segregation measures which created institutions designed to protect normal citizens from the transmission of mental defects. Indeed, mentally retarded children who were not confined in institutions were, until recently, systemati-

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[12] Herr, supra page 1, at 27 (citing N. Kittrie, The Right to be Different: Deviance and Enforced Therapy 325 (1971)).

[13] United States Civil Rights Commission, Accommodating The Spectrum of Individual Abilities 36-37 (1983).

cally excluded from the public school system as another protection against "incompetence." According to estimates of the United States Office of Education, as recently as 1974 1.75 million school children -- nearly half of whom had been properly or improperly classified as mentally retarded -- were barred from the public schools.[14]

Years of segregation have caused and maintained widespread prejudice, fear and ignorance concerning mentally retarded people. Stereotypes of the retarded as dangerous, sexually promiscuous or deviant, mentally ill and incompetent are still commonplace.[15] None of the three city council mem-

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[14] Herr, supra page 1, at 3 (citing Children's Defense Fund, Children Out of School (1974)).

[15] See generally Social and Psychological Aspects of Disability (Stubbins ed. (1977)); Schroedel, Attitudes Towards Persons with Disabilities: A Compendium of Related Literature (1979); Mercer, Labeling the Mentally Retarded (1976); Tringo, The Hierarchy of Preference Toward Disability Groups, 4 Journal of Spec. Educ. 295-305 (1970).

Even technical terms once used to describe

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bers who denied respondent's application for a special use permit knew what mental retardation was. Indeed, two council members thought it was a kind of mental illness or instability. Jt. App. 26, 27, 30.

Finally, the exclusion of mentally retarded persons from the political process renders them virtually powerless to influence majoritarian decisionmaking. As recently as 1979, most states categorically denied mentally retarded persons the right to vote.

This case, therefore combines a critically important liberty interest and a clear inability of the mentally retarded to protect themselves against widespread fear and prejudice.

Even technical terms once used to describe different levels of retardation -- "idiot," "imbecile," "moron" and "feebleminded" (as used in the Cleburne zoning ordinance) -- have become popular terms of derision. Gould, The Mismeasure of Man 158 (1981).

SUMMARY OF ARGUMENT

The City of Cleburne singles out group homes for the mentally retarded and subjects them to a discriminatory zoning procedure which requires a wholly discretionary "special use permit" before a group home for the mentally retarded may be established. Unlike homes for the aged, convalescent homes, nursing homes, hospitals, boarding houses, apartment houses and fraternity houses, all of which may be established in Cleburne's R-3 zoning district without special permission, homes for the mentally retarded (or, in the words of the Cleburne statute, "the feeble-minded") must receive a "special use permit", the issuance of which is wholly discretionary and which is conditioned, in large part, on the acquiescence of nearby residents.

This case arises out of the refusal of Cleburne authorities to grant such a "special

use permit" for a supervised group home of thirteen mentally retarded persons, despite the home's approval by the Texas Department of Human Resources and despite the District Court's explicit finding that:

> "[i]f the potential residents of the ... home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance."

Jt. App. 93 (Finding of Fact No. 24).

Where, as here, a vulnerable group which is the target of prejudice and stereotypical fear is singled out for harsher zoning treatment that reinforces its isolation and segregation, obvious dangers of local majoritarian overreaching are present. This case presents a virtual compendium of the mechanisms available in our legal system to protect a vulnerable minority in such a precarious situation.

First, Congress has explicitly forbidden discrimination against the handicapped, including the mentally retarded, by forbidding

treatment which bars otherwise qualified handicapped persons from the use and enjoyment of federally funded programs. 29 U.S.C. § 794; 31 U.S.C. § 6716(b)(2). Where, as here, a town's zoning scheme singles out the mentally retarded and precludes them from establishing an otherwise qualified group residence in the community, the zoning scheme bars the mentally retarded from the enjoyment of Cleburne's federally funded streets, parks, schools, and other services as effectively as if a wall were built around the town. While the act of zoning may not itself be federally funded, Cleburne's discriminatory zoning scheme fences out the mentally retarded from the use and enjoyment of the various programs which concededly receive hundreds of thousands of dollars in Revenue Sharing funds from the federal government and thus is in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the

Revenue Sharing Act, 31 U.S.C. § 6716(b)(2) (1984). Cf. Cannon v. University of Chicago, 441 U.S. 677, 680 (1979).

Second, the Fourteenth Amendment establishes two procedural protections designed to minimize the potential for unfair treatment of vulnerable minorities by forbidding the operation of standardless permit systems aimed solely at vulnerable minorities and by forbidding the government from forcing minorities to run a special majoritarian gauntlet.

The Cleburne zoning scheme, explicitly aimed at homes for the mentally retarded, violates both sets of procedural guarantees. The decision whether or not to grant a special use permit is wholly discretionary, leaving frightened or ignorant officials free to generate post hoc rationales for excluding the mentally retarded without any need to test their decision against pre-existing,

neutral criteria. E.g., Kolender v. Lawson, 461 U.S. 352 (1983); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976). In fact, the only criteria present in the statute direct officials to canvas neighboring property owners before permitting a group home for the mentally retarded to be established. Such a standardless permit system keyed to the wishes of neighboring property owners is a virtual invitation to discriminatory treatment. Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

Finally, at a minimum, the substantive reach of the Fourteenth Amendment forbids zoning decisons which deprive vulnerable minorities of critically important liberty interests on the basis of stereotypical thinking and irrational fear. Where, as here, a community is prepared to permit homes for the aged, convalescent homes, nursing homes, hospitals, boarding houses, apartment

houses and fraternity houses, to single out group homes for the mentally retarded for harsher differential zoning treatment is to surrender to an age-old fear of the mentally retarded which stigmatizes them as dangers to the community. In fact, by any measure of inconvenience or danger to the community, the mentally retarded pose no greater burden than the concentrations of aged, infirm, college age students and just plain families that Cleburne is prepared to welcome into its R-3 district. Yet, of the reasons given by Cleburne officials for denying the zoning permit, most, if not all, flow squarely from irrational and unfounded fear of the mentally retarded. Whether couched as the concerns of neighboring property owners, the fears of the elderly, concerns over who might pay for any damage the mentally retarded might cause, proximity to a junior high school, the number of mentally retarded residents or the lack of

a large enough fenced-in yard for recreation, the common denominator of the town's objections is a stereotypical vision of mentally retarded persons as dangers to the community. Cleburne's fear has absolutely no basis in fact. It hardly requires an expansive view of the Fourteenth Amendment to read it as protecting the mentally retarded from being irrationally stigmatized as dangers to the community and unjustly condemned to languish in segregated institutions. See Palmore v. Sidoti, 80 L.Ed.2d 421 (1984); Reed v. Reed, 404 U.S. 71 (1971).

Moreover, even if Cleburne's officials had been able to mount a less transparent apology for denying the permit, the inability of the mentally retarded to defend their vital liberty interests through the political process, the obvious danger of irrational prejudice directed at a historically despised and misunderstood group, and the critically

important nature of the "liberty" interest at stake combine to require a heightened level of judicial scrutiny designed to assure that a given decision to single out the mentally retarded for adverse treatment does not flow from irrational prejudice, fear, or callous indifference. Just as the concept of burden of proof in criminal cases operates to deflect jury error in favor of constitutional values, so the concept of heightened judicial scrutiny erects a burden of justification designed to deflect error from the very real danger that the vital interests of despised and vulnerable minorities will be undervalued, through both prejudice and callous indifference, in the political process.

Where, as here, a vulnerable minority has been deprived of a critically important liberty interest pursuant to a standardless exercise of official discretion, it is consistent with -- indeed supportive of -- demo-

cratic principles to require officials to demonstrate a substantial basis for their refusal to permit a vulnerable and historically persecuted group to establish a home in their community. And when, as here, officials seek to justify their decision to bar a group home for the mentally retarded by arguing that the housing site may be flooded once every five hundred years or that a site acceptable to the Texas Department of Human Resources is nevertheless inadequate in the eyes of local zoning officials having absolutely no expertise in the area, they have failed to posit sufficiently weighty reasons to satisfy their burden of justification. While the precise level of heightened scrutiny may vary depending upon the nature of the protected group and the importance to the group of the interest at stake, surely it requires more than the transparently disingenuous justifications offered by Cleburne's

officials in this case.

ARGUMENT

I. Cleburne's Zoning Ordinance and Decision to Deny the Special Use Permit Excludes Mentally Retarded Persons from the City and from City Programs and Activities Receiving Federal Revenue Sharing Funds, Thus Violating the Anti-Discrimination Provisions of the Revenue Sharing Act.

Although the court below stressed the equal protection issue of whether governmental classifications based on a person's mentally retarded status constitute "quasi-suspect" classifications deserving heightened judicial scrutiny, this Court can, and therefore should, affirm the decision below on statutory, not constitutional grounds. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., dissenting). The record shows that Cleburne has effectively excluded these mentally retarded persons from the city, thus depriving them of participation in all city programs or activities that receive federal revenue sharing

funds. Thus, even if the zoning activities of the city council are treated as if they received no federal funds, Cleburne cannot hide behind a program-specificity defense when it has excluded the mentally retarded from the city altogether.

A. The Revenue Sharing Act Protects Handicapped Persons Against Discrimination By Recipient Programs or Activities.

The Revenue Sharing Act prohibits "discrimination against an otherwise qualified handicapped individual under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)" by any "program or activity of a ... unit of general local government if the government receives" Revenue Sharing payments. 31 U.S.C. § 6716(b)(2) (1984).

In the years prior to and including the year of trial, Cleburne received substantial federal financial assistance under the Revenue Sharing Act. See Jt. App. 93. The district court found that the Cleburne City

Council had spent the Revenue Sharing funds "in the following ways, among others: (a) road construction; (b) the purchase of capital equipment for the city's department of public works; (c) the purchase of capital equipment for City Hall; (d) water utility systems; (e) parks and recreation; (f) debt service; and (g) library materials." Jt. App. 94.

The district court and the court of appeals both held that the antidiscrimination provisions of the Revenue Sharing Act did not apply to the city's actions in this case, because Revenue Sharing funds had not been used to finance the challenged zoning activities of the city council. Recognizing the program-specific reach of 31 U.S.C. § 6716(b)(2), plaintiffs argued below that the city council itself is an activity receiving federal funds, because the city council decides which specific city programs will ulti-

mately receive the funds. The court of appeals rejected this theory under the circumstances of this case. Jt. App. 121.[16] However, regardless of whether the city council is itself an activity receiving federal funds, by excluding the mentally retarded from the community, the city council has unlawfully excluded them from the enjoyment of and participation in every federally funded program in the community.

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[16] Cleburne incorrectly argues that CLC has failed to preserve its Revenue Sharing Act claim by not cross-petitioning for certiorari. This Court has held on many occasions that a respondent has the right to urge any argument in support of a judgment in its favor, including contentions rejected by the court below. See, e.g., United States v. Arthur Young & Co., 79 L.Ed.2d 826, 834 (1984); Langnes v. Green, 282 U.S. 531, 535-39 (1931); 12 Moore's Federal Practice ¶ 400.05-5 (1982).

B. The Program-Specific Limits on the Reach of the Anti-Discrimination Provisions of the Revenue Sharing Act and § 504 of the Rehabilitation Act Do Not Bar an Action on Behalf of Handicapped Persons Who Have Been Zoned Out of a City Whose Programs or Activities Receive Federal Revenue Sharing Funds.

Where handicapped persons have been effectively zoned out of an entire city, plaintiffs need not prove that the zoning function of the city council itself received federal financial assistance. Just as a black student denied admission to a segregated school is effectively denied participation in the federally funded science program (and every other program and activity) at the school, a mentally retarded person excluded from residence in a city is effectively denied participation in the city's programs or activities that receive Revenue Sharing funds.

The program-specific nature of the anti-discrimination provisions of the Revenue

Sharing Act, 31 U.S.C. § 6716(b)(2), and of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, cannot bar relief in cases in which handicapped persons have been denied admission to or otherwise excluded from the entity whose programs or activities receive federal financial assistance.

In Cannon v. University of Chicago, 441 U.S. 677 (1979), this Court assumed that proof of sex discrimination in admissions obviated any inquiry into program-specificity under Title IX. This Court explicitly stated that proof of only two facts from Cannon's complaint could establish a violation of § 901(a) of Title IX: (1) that the medical school excluded Cannon because of her sex; and (2) that educational programs at the school were receiving federal financial assistance at the time of the exclusion. Id. at 680.

Grove City College v. Bell, 79 L.Ed.2d

516 (1984), is fully consonant with Cannon's assumption. This Court held in Grove City College that federally guaranteed loans to Grove City College students constituted federal financial assistance to the college, but that the antidiscrimination provisions of Title IX of the Education Amendments of 1972, 20 U.S.C § 1681(a), applied only to the program -- the financial aid office -- that received the student loan money.

If, contrary to fact, Grove City College had an express policy of refusing to admit handicapped persons, and even if the admissions office itself received no federal monies, surely rejected handicapped applicants could have successfully argued that they had been denied participation in all of the College's programs or activities receiving federal financial assistance. The district court in Grove City College explicitly noted that where an institution denies admis-

sion to all members of a protected group, the excluded students are excluded from the benefits of all of the institution's federally funded activities. Grove City College v. Harris, 500 F. Supp. 253, 268 (W.D. Pa. 1980), rev'd, 687 F.2d 684 (3d Cir. 1982), aff'd, 79 L.Ed.2d 516 (1984). This Court agreed with the district court's holding regarding Title IX's program-specifity and did not contradict the district court's reasoning that an exclusion from admission would present a different case.

Lower courts that have correctly recognized the program-specific limitations on the antidiscrimination provisions of Title VI,[17] Title IX,[18] and § 504 of the Rehabilitation Act[19] have distinguished situations in which

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[17] Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4.

[18] Education Amendments of 1972, 20 U.S.C. §§ 1681-86.

[19] Section 504 was modelled after Title IX, which in turn was modelled after Title VI. All three statutes [cont'd. on next pg]

members of protected groups have been denied admission to the institution which has programs or activities that receive federal financial assistance. See, e.g., Iron Arrow Honor Society v. Heckler, 702 F.2d 549, 563 (5th Cir.), vacated and remanded as moot, 78 L.Ed.2d 58 (1983); Hillsdale College v. HEW, 696 F.2d 418, 428-29 (6th Cir. 1982); Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 n. 2 (1st Cir. 1981) (plaintiff alleging discrimination in admissions to an institution not required to allege that a particular federally funded program discriminated against her, because "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs is tainted"), cert.

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share common language concerning a "program or activity." See Brown v. Sibley, 650 F.2d 760, 767-68 (5th Cir. 1981).

denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321, 328 (E.D. Va. 1982); Haffer v. Temple University, 524 F. Supp. 531, 539 (E.D. Pa. 1981) ("discriminatory admissions practices ... necessarily taint the entire institution"), aff'd and remanded per curiam, 688 F.2d 14 (3d Cir. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376, 1387 (E.D. Mich. 1981) ("Racial discrimination respecting acceptance or admission into educational institutions permeates all programs and activities within those institutions."), aff'd, 699 F.2d 309 (6th Cir. 1983); see also Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975) (federal veteran's benefits may not be used by eligible veterans who attend university with racially discriminatory admissions policy).[20]

C. Cleburne Has Effectively Excluded Mentally Retarded Persons.

Plaintiff Cleburne Living Center obtained a house at 201 Featherston Street in Cleburne for the purpose of operating a group home for thirteen mildly to moderately mentally retarded persons. State authorities inspected and approved the house for its intended use, provided that certain repairs and modifications were performed. Jt. App. 73-74, 96.

Cleburne's zoning ordinance permits many types of multi-family dwellings and institutional structures to locate in the R-3 residential zone that encompasses 201 Featherston Street, but requires homes for the "feeble-minded" to obtain a special use permit. Jt. App. 61-63, 90-91. The city council denied

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[20] The sole decision that failed to recognize the "admissions" exception to program-specificity did so without directly addressing the issue. Stewart v. New York University, 430 F. Supp. 1305, 1313-14 (S.D.N.Y. 1976).

CLC's application for a special use permit. The district court found that if the potential residents of 201 Featherston Street had not been mentally retarded, the zoning ordinance would have permitted their use of the home. Id. 93. The court found further that the denial of the special use permit "was motivated primarily by the fact that the residents of the home would be persons who are mentaliy retarded." Id. 94.

In short, the potential residents of the Featherston home were, aside from their mental retardation, "otherwise qualified" to live in a group home in an R-3 district, see Southeastern Community College v. Davis, 442 U.S. 397 (1979), and were denied use of the Featherston home (and consequently, of federally funded city services and facilities) solely by reason of their handicap.

The record indicates that denial of the special use permit had the result of exclud-

ing from the city the thirteen mentally retarded potential residents of the Featherston home. Cleburne's suggestions that a more appropriate alternative location for the group home was available, see City Brief 7 n. 6, 26-27, misstates the record. The only city official who examined the alternative site did not know whether it could have met state standards for intermediate care facilities for the mentally retarded. Jt. App. 46-47. State officials told CLC co-owner David Southern that the alternative site would never be appropriate for a group home for the mentally retarded. Id. 48.

The district court also rejected Cleburne's claim that mentally retarded persons could live elsewhere in Cleburne, other than in a group home. The Court found:

> Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living

> patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

Id. 94 (emphasis added).

Nor can Cleburne claim that the potential residents of the Featherston home could live in some other community, yet still participate in or derive benefit from the city's programs or activities that received federal Revenue Sharing dollars. The city spent its Revenue Sharing income on roads, water, parks and recreation, debt service, library materials, and capital equipment, precisely because such amenities were of particular value to Cleburne residents.[21]

Finally, that the exclusion is not absolute does not bar plaintiffs' claim. In Lau v. Nichols, 414 U.S. 563, 566 (1974), for

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[21] For instance, CLC owners chose the Featherston site in part because of its proximity to a city park. Jt. App. 32.

example, this Court recognized in a Title VI action that teaching the public school curriculum in English to non-English-speaking Chinese students "effectively foreclosed [them] from any meaningful education."[22] The school district did not literally exclude Chinese students from the schools, but the school district's failure to establish a program to rectify the complaining students' language problem had the practical effect of excluding them from the school district's many programs and activities receiving federal funding.[23]

In sum, the requirement of, and subsequent denial of, a special use permit for the

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[22] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4, prohibits racial discrimination in any program or activity receiving federal financial assistance.

[23] See Johnson v. City of Arcadia, 450 F. Supp. 1363, 1379 (D. Fla. 1978) (blacks successfully challenged, under Title VI, unequal provision of city services, including the location of better parks and recreational facilities in white neighborhoods).

Featherston home as a group home for the mentally retarded excluded otherwise qualified persons from the opportunity to participate in Cleburne's numerous programs or activities receiving Revenue Sharing funds, in violation of the Revenue Sharing Act and § 504. Southeastern Community College v. Davis, 442 U.S. at 412; cf. Alexander v. Choate, 53 U.S.L.W. 4072, 4076 (U.S. Jan. 9, 1985) (no § 504 violation where handicapped had not been excluded from program receiving federal funds).

II. Cleburne's Zoning Procedure Violates Procedural Due Process of Law Because It Requires a Vulnerable Minority to Secure a Wholly Discretionary Permit the Issuance of Which is Largely Dependent on the Acquiescence of Neighboring Property Owners in Order to Establish an Otherwise Qualified Group Home For the Mentally Retarded.

This Court has long recognized that ad hoc discretionary decision-making poses an unacceptably high risk of discriminatory or arbitrary application of the law. E.g.,

Kolender v. Lawson, 461 U.S. 352 (1983); Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Thus, whenever a vulnerable group has sought to enjoy a significant liberty interest, the Court has forbidden officials to exercise standardless discretion in deciding whether to permit the activity.

In Lovell v. Griffin, 303 U.S. 444 (1938), for example, the Court invalidated an ordinance which granted the City Manager discretionary power to grant or deny a permit to distribute leaflets. Lovell has been followed by the Court on numerous occasions in striking down First Amendment licensing schemes vesting local officials with excessive discretion to discriminate against disfavored groups.[24]

Similarly, in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and Smith v. Goguen, 415 U.S. 566 (1974), the Court invalidated vague statutes because they vested officials with excessive discretion in dealing with vulnerable minorities.

In Papachristou, the Court noted:

> Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.' [quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)]. 405 U.S. at 170.

In Smith v. Goguen, 415 U.S. 566 (1974),

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[24] E.g., Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, 310 U.S. 296 (1940); Largent v. Texas, 318 U.S. 418 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

Justice Powell noted for the Court:

> Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law. 415 U.S. at 575.

Most recently, in Kolender v. Lawson, 461 U.S. 352 (1983), the Court invalidated a California "stop and identify" statute because it vested excessive discretion in local officials. See also Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Morton v. Ruiz, 415 U.S. 199, 232 (1974); Hornsby v. Allen, 326 F.2d 605, 609-10 (5th Cir. 1964), on petition for rehearing, 330 F.2d 55 (5th Cir. 1964) (per curiam) (invalidating standardless liquor licensing provision); Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968) (requiring objective criteria to determine access to public housing).

The Cleburne ordinance vests standard-

less discretion in zoning officials to determine whether to grant a permit to establish a group home for the mentally retarded. Thus, like the City Manager in Lovell, the Mayor in Hynes, and the police in Papachristou, Smith v. Goguen and Kolender, Cleburne's zoning officials are empowered to make standardless, ad hoc decisions about whether to permit a vulnerable minority to enjoy a critical liberty interest. While the liberty interest at stake in this case is different from the liberty interests at stake in Papachristou or Kolender, it is no less significant. For the mentally retarded, the difference between life in an impersonal state institution and life in a group home is the very essence of liberty. See supra at 1-7; cf. Vitek v. Jones, 445 U.S. 480 (1980). When values as critical as freedom of movement, the capacity for self-fulfillment, and the opportunity for a normal life are at stake, the clear teach-

ing of this Court forbids the type of standardless decisionmaking required by the Cleburne ordinance, especially when such standardless decisionmaking is explicitly and selectively aimed at a vulnerable group that has been the target of widespread discrimination.

The only guidance given by the ordinance to Cleburne's officials in determining whether to grant permission to establish a group home for the mentally retarded is a command to ascertain the wishes of all property owners within 200 feet of the proposed home. Jt. App. 63. Indeed, one of the explicit reasons given by Cleburne's officials for denying the permit was the opposition of neighboring property owners. Jt. App. 95. By singling out the mentally retarded and requiring them to run a majoritarian gauntlet of neighboring property owners, Cleburne's ordinance violates established Fourteenth

Amendment norms.

In Eubank v. Richmond, 226 U.S. 137 (1912), the Court invalidated a local zoning ordinance which permitted two-thirds of the property owners abutting on a street to establish a building line because the statute:

> ... create[d] no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously.

226 U.S. at 144.

Similarly, in Washington ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), the Court invalidated a Washington ordinance which provided:

> A philanthropic home for children or for old people shall be permitted ... when the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building.

278 U.S. at 118.

Noting that no standard or rule governed

the grant of consent, which could be withheld "arbitrarily" and as a matter of "caprice," the Court unanimously invalidated the ordinance. See also Larkin v. Grendel's Den, 459 U.S. 116 (1982).

The Cleburne ordinance does not formally delegate power to abutting landowners as in Eubank or Roberge. Rather, it directs zoning officials to ascertain the wishes of neighboring landowners before exercising a standardless discretion to grant or deny the permit. Where, as here, officials freely admit that they acted as conduits for the wishes of the neighboring landowners, surely the lack of a formal delegation is not sufficient to distinguish Roberge.

Moreover, where, as here, the obligation to consult neighboring landowners before establishing a group home is not a general obligation imposed on all land-users, but is discriminatorily aimed at the mentally re-

tarded, the principles of Reitman v. Mulkey, 387 U.S. 369 (1967), and Hunter v. Erickson, 393 U.S. 385 (1969), compel invalidation of the ordinance. In both Reitman and Hunter, the Court invalidated schemes that required a vulnerable minority to run a special majoritarian gauntlet before enjoying open housing legislation. Under the Cleburne ordinance, the mentally retarded must undergo not merely the general majoritarian gauntlets found invalid in Reitman and Hunter, but the special gauntlet of neighboring property owners found especially offensive in Eubank and Roberge. When one pyramids the ordinance's lack of criteria, its deference to the wishes of neighboring landowners and its explicitly discriminatory application to the mentally retarded, it fails to meet minimal standards of procedural regularity.[25]

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[25] In James v. Valtierra, 402 U.S. 137 (1971), and Eastlake v. Forest City Enterprises, 426 U.S. 668
[cont'd. on next pg]

III. Cleburne's Refusal to Grant Permission to Establish a Group Home for the Mentally Retarded Violates the Equal Protection Clause Because (A) It Was Based on Stereotypical Fears Concerning Mental Retardation, and (B) It Is Not Supported By A Substantial Justification.

A. Cleburne's Resort to Stereotypical Thinking.

At a minimum, the Equal Protection Clause requires officials to avoid invidious stereotypical thinking in making governmental decisions. E.g., Palmore v. Sidoti, 80 L.Ed.2d 421 (1984); Reed v. Reed, 404 U.S. 71 (1971). One reason why race, sex, alienage and illegitimacy have provided such fertile grounds for equal protection jurisprudence is that fear and prejudice have too often generated stereotypical decisionmaking aimed at such vulnerable and historically disadvan-

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(1976), the Court upheld referenda on proposed zoning changes. However, unlike the Cleburne ordinance, the referenda in Valtierra and Eastlake did not overvalue the interests of abutting landowners and, most importantly, were not discriminatorily utilized only when a vulnerable minority sought to enter the neighborhood.

taged groups. The adoption of heightened equal protection scrutiny in connection with such groups has reflected this Court's awareness that stereotypical thinking affecting certain vulnerable groups is so prevalent in our society that any decision which adversely affects them carries a risk of stereotypical content. The imposition of a heightened burden of justification in such cases is designed to assure that significant governmental interests rooted in reality -- and not prejudice -- underly the adverse action. As such, heightened scrutiny is a means of deflecting error away from invidious stereotypical treatment of vulnerable groups, much as burden of proof rules deflect error in other constitutional contexts. E.g., Addington v. Texas, 441 U.S. 418 (1979); Santosky v. Kramer, 455 U.S. 745 (1982).

In this case, the degree to which uninformed, stereotypical thinking about the

mentally retarded dominated the decision to deny permission to establish the group home is all too obvious. Jt. App. 24-31 (testimony of city council members); Jt. App. 95 (list of reasons for denial of permit). Fear of the mentally retarded literally permeated every aspect of the zoning process, beginning with the decision to treat the "feeble-minded" differently in the zoning statute and culminating in the litany of fear that passed for rationality in the District Court.

Of the six[26] reasons given to justify denial of the permit, four[27] explicitly reflect irrational fear of the mentally retarded and the fifth[28] is an indirect manifestation of such fear. Given the overwhelming

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[26] The seventh "in general, the presentation made before the City Council" is so devoid of content as to render it meaningless.

[27] Jt. App. 95 (reasons a, b, c, and e).

[28] Jt. App. 95 (reason d).

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role played by stereotypical fear in denying the permits, resort to heightened scrutiny as a means of deflecting error is not necessary to brand Cleburne's actions unlawful. As the Court has noted, when obvious stereotypical thinking has deprived a vulnerable group of a significant interest, the rational-basis standard of review, rigorously applied, can be an effective guaranty of fair treatment. E.g., Baxstrom v. Herold, 383 U.S. 107 (1966); Rinaldi v. Yeager, 384 U.S. 305 (1966); Jackson v. Indiana, 406 U.S. 715 (1972); James v. Strange, 407 U.S. 128 (1972).

Thus, in United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court utilized rational basis scrutiny to invalidate a limitation on eligibility for food stamps that appeared to be based upon stereotypical thinking about "hippies" and "hippie communes." Similarly, in United

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States Department of Agriculture v. Murry, 413 U.S. 508 (1973), the Court invalidated a limitation on food-stamp eligibility that forced administrators to treat households stereotypically, instead of on the basis of reality. See also, Jimenez v. Weinberger, 417 U.S. 628 (1974); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Rational basis review is not a synonym for upholding a government decision. Rather, it should signal a serious inquiry into whether a challenged government classification has its roots in fact or is founded on impermissible stereotypes. Where, as here, the dominance of stereotypical thinking could not be more apparent, Cleburne's decision to exclude the group home in question is plainly violative of the Equal Protection Clause. Indeed, both the State of Texas, Brief at 5, and the Solicitor General, Brief at 6, 10, virtually concede as much.

When, as in Belle Terre v. Boraas, 416 U.S. 1 (1974), an exclusionary zoning decision is based not on stereotypical thinking about the category of person involved, but on a legitimate fact-based concern for population density and the impact of transiency on a neighborhood, application of rigorous rational basis scrutiny will generally uphold the zoning decision. But when, as in Buchanan v. Warley, 245 U.S. 60 (1917), and Moore v. Village of East Cleveland, 431 U.S. 494 (1977), exclusionary zoning decisions are based, respectively on stereotypes about race and the appropriate definition of family, they cannot survive a properly administered rational basis scrutiny.[29] Where, as here,

[29] Strictly speaking, Moore v. Village of East Cleveland, supra, was not an equal protection case, since the Court elected to analyze it as a substantive due process case. 431 U.S. at 496 n. 3 (plurality opinion). However, the Court stressed the degree to which the East Cleveland definition of family failed to accord with the reality of the extended family prevalent in many social groups.

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stereotypes about the mentally retarded literally dominated the decisionmaking process, Belle Terre can hardly provide support for Cleburne's decision.

B. The Relevance of Heightened Scrutiny.

This Court has repeatedly recognized that when vulnerable groups that have traditionally been the target of stereotypical thinking are singled out for disfavored treatment, rational basis review often fails to provide sufficient protection against the danger of stereotypical decisionmaking. E.g., United States v. Carolene Products Co., 304 U.S. 144, 152-53 & n. 4 (1938); Korematsu v. United States, 323 U.S. 214 (1944); Plyler v. Doe, 457 U.S. 202 (1982). The Court has recognized that it is too easy to cloak prejudice and ignorance in the guise of a post hoc rationalization. In order to minimize the very real danger that vulnerable groups will be unable to prevent adverse stereotyp-

ical treatment at the hands of officials whose ignorance or fear blinds them to reality, this Court has imposed a burden of justification on officials wishing to treat such a victim group in an adverse manner. The effect of such heightened scrutiny is, as Korematsu attests, not a total prohibition on adverse action, but a prophylactic guaranty that such adverse action is predicated not on ignorance, fear or prejudice, but rather on legitimate governmental concerns. Where a historically unpopular and vulnerable group is treated adversely without substantial factual justification, a lingering and unacceptable doubt persists that stereotypical thinking and/or callous indifference was at work. Heightened scrutiny, by forbidding adverse treatment in the absence of a substantial factual basis, serves to minimize that risk.

Of course, when there is no reason to

fear the existence of invidious stereotypical thinking or a pattern of callous neglect, no reason exists to deflect error against it. In such settings, rational basis scrutiny, if applied in a rigorous manner, serves adequately to guard against majoritarian overreaching. But when the historic pattern of stereotypical thinking and callous neglect of a vulnerable group is manifest -- as it is with the mentally retarded -- the application of heightened scrutiny to guard against the unfair and unnecessary undervaluing of their vital interests by a frightened majority is fully compatible with democratic political theory -- indeed, it reinforces the legitimacy of the democratic process.

Cleburne's officials have asserted only two allegedly fact-based justifications for denying the permit.[30] First, they argue that

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[30] The other justifications do not even purport to be rooted in fact and are, instead, expressions of irrational fear of the mentally retarded. See supra
[cont'd. on next pg]

the premises may be flooded once every five hundred years. Jt. App. 95. Why homes for the aged and the convalescent are less vulnerable to such a flooding risk is left a mystery. Second, despite the approval of the site by the Texas Department of Human Resources, Cleburne's zoning officials question its suitability because it lacks a large enough fenced-in yard and has only four bedrooms. The short answer to such a justification is that it seeks to substitute the untutored judgment of local zoning officials[31] for the judgment of Texas officials vested with the professional responsibility for supervising group homes for the mentally retarded.

Taken together, Cleburne's objections

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page 48.

[31] The trial testimony of Cleburne's officials revealed an almost total ignorance of the mentally retarded and their needs. Jt. App. 24-31.

based on the 500-year flood plain and the alleged lack of space fail to meet even a rationality standard. Even if they did, however, a lingering question would remain as to whether the denial was based on irrational fear of the mentally retarded. The purpose of heightened scrutiny is to dispel that lingering question by requiring a factual justification sufficient to put it to rest. Given the vulnerability of the mentally retarded to stereotypical treatment, the importance of the liberty interest at stake and the woeful inadequacy of Cleburne's attempt at a factual justification for its decision, heightened scrutiny, if necessary, is clearly appropriate to minimize the risk of majoritarian overreaching.

In Moore v. Village of East Cleveland, 431 U.S. 494 (1977), this Court utilized a form of heightened scrutiny to invalidate a zoning ordinance restrictively defining the

concept of "family." In Moore, the interest in family privacy was deemed sufficient to trigger heightened scrutiny under the Due Process Clause. In this case the interest of the mentally retarded in escaping from the prison of large, impersonal institutions in order to enjoy the freedom of movement and opportunity for self-fulfillment which are available to them only in a group home setting is fully comparable to the interest in family integrity which triggered strict scrutiny in Moore. Cf. Vitek v. Jones, 445 U.S. 480 (1980). Moreover, the discriminatory nature of the Cleburne ordinance, which singles out a despised and vulnerable minority for exclusionary zoning, is even more

appropriate for heightened scrutiny than the East Cleveland ordinance in Moore.[32]

[32] Given this Court's recent admonition to counsel that they have a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation," Board of License Commissioners v. Pastore, 53 U.S.L.W. 4057, 4058 (U.S. Jan. 8, 1985) (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)), amici note that the parties as well as other amici have debated a suggestion of mootness caused by a state regulation that limits the size of group homes for the mentally retarded to six persons. The Featherston home would have housed thirteen persons.

CONCLUSION

For the above stated reasons, the judgment of the court below should be affirmed.

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